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No. 86-465

In the Supreme Court of the United States

OCTOBER TERM, 1986

FLORIDA ROCK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly remanded this case to the trial court to consider current market value in determining whether a taking occurred when the Corps of Engineers denied petitioner's application for a permit, under Section 404 of the Clean Water Act, to discharge pollutants into the waters of the United States.

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Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-30) is reported at 791 F.2d 893. The opinion of the Claims Court on liability (Pet. App. 31-71) is reported at 8 Cl. Ct. 160, and the Claims Court's opinion on valuation (Pet. App. 72-73) is not reported.[1]

[1] The transcripts of two oral opinions issued by the Claims Court (C.A. App. 9-55, 87-120) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1986. A petition for rehearing was denied on June 26, 1986 (Pet. App. 1). The petition for a writ of certiorari was filed on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters." Section 101(a), 33 U.S.C. 1251(a). Under Section 301(a) of the Act, 33 U.S.C. 1311(a), discharges of pollutants into those "navigable waters" are illegal, unless conditions found in other specified sections of the Act are satisfied. One of those specified sections is Section 404 of the Act, 33 U.S.C. (& Supp. II) 1344, which allows the Secretary of the Army—acting through the Chief of Engineers—to issue permits for the discharge of dredged or fill materials into the "navigable waters." See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985).

2. Petitioner, Florida Rock Industries, Inc., is a large-scale miner of limestone, which it extracts for use in the construction industry (Pet. App. 4).[2] In 1972, Florida Rock paid $2,964,000 to acquire three

[2] As the opinions below describe (Pet. App. 6-7, 32-33), the process of extracting limestone creates some turbulence in the water as limestone and muck are dredged up and temporarily redeposited in the water (*id.* at 6). After the limestone has been removed, a deep body of standing water remains, which is "incapable of sustaining the rich variety of plant and animal life found in the" wetlands (*id.* at 33).

tracts, aggregating 1,560 acres, in southern Florida (*id.* at 5). The site, which is frequently flooded by the State as a water control measure (*ibid.*), serves as the home of a variety of birds, fish and vegetation. It consists of wetlands which replenish the Biscayne Aquifer (which is the sole source of drinking water for Dade County) and, in their natural state, filter and purify the ground water flowing through the aquifer (*ibid.*; see 44 Fed. Reg. 58797 (1979)).

Because of economic conditions, it was not until 1978 that petitioner commenced mining. Petitioner did not, however, request or obtain a permit from the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. (& Supp. II) 1344 (Pet. App. 6, 34).[3] When the Corps learned of the mining operation, it ordered petitioner to cease and desist. In 1980, petitioner applied to the Corps for a permit to mine only 98 acres of the property, an estimated three years' production (Pet. App. 6).[4]

The Corps of Engineers gave notice of the application to a variety of federal agencies, including the Environmental Protection Agency, the National Park Service, and the Fish and Wildlife Service. It also

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[3] Until 1975, the Corps of Engineers had taken the position that nontidal wetlands which were not navigable in fact were not subject to the Clean Water Act. In response to litigation, the Corps of Engineers changed its regulations in 1975, with relatively minor additional changes in 1977 and 1982. See *United States* v. *Riverside Bayview Homes, Inc.*, slip op. 1-2.

[4] At that time, the Corps requested limestone mining firms to submit applications only for three-year permits until an environmental impact statement could be completed on the effects of limestone mining in Dade County. Petitioner did not challenge the Corps' request, and limited its application to three years' production.

notified the State and Dade County. All of these agencies and instrumentalities objected, focusing primarily on the loss of wetlands "whose benefits extended far beyond Florida Rock's own property" (Pet. App. 6, 7).[5] On October 2, 1980, the district engineer denied petitioner's application, determining that the requested permit would not be in the public interest (Pet. App. 7).

3. Petitioner did not seek judicial review of the Corps' administrative determination. Instead, petitioner brought the present action in the United States Claims Court, contending that the permit denial constituted a taking of its entire 1,560 acre property and seeking the payment of just compensation.

In the liability phase of its bifurcated proceedings, the court held that the denial of the permit constituted a taking of the 98-acre tract, but not of the remainder of the 1,560-acres. The Court found that rock mining was the only economically viable use of the property (Pet. App. 34), and that the proposed rock mine "would not * * * result[] in pollution of the water supply" (*id.* at 61).[6]

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[5] Dade County stated that petitioner would have to obtain (but had not yet applied for) permits from the County before any mining could commence and that if it received such an application, the County would require petitioner to establish controls to limit to 50 feet the turbidity caused by limestone mining (Pet. App. 6).

[6] In its oral opinion following trial on May 7, 1984, the Claims Court stated that such pollution could occur and ruled that the Corps' finding of fact to that effect must be accepted. See Pet. App. 9; C.A. App. 34-35. In its written opinion on the same issue filed one year later, the trial court nonetheless rejected the Corps' findings of fact. The court stated that the

Following a trial on valuation, the court concluded that just compensation for the 98 acres amounted to $1,029,000 (Pet. App. 72-73).[7]

4. Both parties appealed. The United States Court of Appeals for the Federal Circuit vacated the Claims Court's finding that a taking of property had occurred and remanded the case for further consideration because (Pet. App. 4) "[t]he trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him."[8]

The court of appeals specified two errors in the trial court's analysis. First, the Claims Court should not have considered the question whether petitioner's mining activity would cause pollution (Pet. App. 12-16). The court of appeals stated (*id.* at 12-14) that in the absence of pollution the Corps of Engineers would have had no jurisdiction under the Clean Water Act and the denial of petitioner's application would in that instance be an unauthorized action by the Corps that would not constitute a taking of property by the government. Thus, if petitioner wished to challenge the regulatory authority of the Corps, the proper means would be a suit in district court

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proposed rock mine "would not have resulted in pollution of the water supply" (Pet. App. 61).

[7] Although it had previously rejected petitioner's taking claim with respect to the remainder of the 1,560 acre tract, the court nevertheless determined that the aggregate value of the entire parcel was $10,580,000. The court made that determination in order to avoid the need for a retrial in the event the court of appeals reversed the ruling that only 98 acres had been taken.

[8] The court of appeals affirmed the trial court's determination that, in any event, no more than 98 acres had been taken (Pet. App. 27-28, 30).

under the Administrative Procedure Act (Pet. App. 13-15). In the view of the court of appeals, when a party brings a Tucker Act suit it necessarily concedes the authority for the government's actions (Pet. App. 15).

The court of appeals found that the Claims Court also erred in failing to consider the effect of the alleged taking on the fair market value of the property as one of the factors in deciding whether a taking had occurred (Pet. App. 20).[9] Relying on this

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[9] The court of appeals also addressed the trial court's determination that there was no genuine market value for the property. Petitioner's witness, Dr. Nichols, who was not a real estate appraisal expert, testified that some of the persons willing to purchase the land were foreigners or possible victims of fraud or self-deception (Pet. App. 21). The government's real estate witness, Mr. Cantwell, a qualified real estate appraiser, stated that a conventional market did exist, including persons willing to forgo immediate income in hope of long-term gain (*ibid.*). He testified about several comparable sales in the immediate vicinity of petitioner's property, and stated that several offers had been made for petitioner's property at prices ranging up to $4,000 per acre (Pet. App. 8). (Petitioner's original purchase price of $2,964,000 for the 1,560 acres averages $1,900 per acre (see Pet. App. 5).)

The court of appeals ruled that the trial court's acceptance of Dr. Nichols' testimony was error (Pet. App. 23):

> We are left with a profound conviction that a mistake has been made. Since the tract was not listed for sale, the $4,000 per acre offer, the frequent inquiries, and the assessed value, must have reflected interest of knowledgeable people, not foreigners or gulls. There may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain.

The appellate court stated that Mr. Cantwell's testimony, if considered and believed, established the existence of a market

Court's decision in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12-13, the court of appeals stated that the factors pertinent to the ad hoc factual inquiry whether governmental action constitutes a taking include the economic impact of the regulations on the claimant, the extent to which the regulations interfere with distinct, investment-backed expectations, and the character of the government action (Pet. App. 19).

ARGUMENT

The court of appeals did not decide whether the facts of this case constitute a taking. Rather, it ruled only that the trial court's decision was incorrect because it did not take into account the market value of the property as subject to the Corps' regulations, and because the lower court disregarded the Corps' factual findings, specifically the finding that the proposed mining activities would cause pollution. There is no reason for this Court to consider the interlocutory decision below, which does not conflict with any decision of this Court or of any other court of appeals.

1. As petitioner recognizes (Pet. 12-13), this Court's decisions establish an ad hoc approach to deciding whether regulations affecting property constitute a taking. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); *United States* v. *Riverside Bayview Homes, Inc.*, slip op. 4-5; *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 12-13.

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in which Florida Rock could have disposed of the property and thereby mitigated the severity of the regulatory action. The court ruled that the existence of that market might well allow a sufficient remaining use of the property to justify a ruling that no taking had occurred (Pet. App. 24).

This Court's decision in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), is particularly instructive. In that case a corporation owned a 38-acre tract of land on which it had mined sand and gravel for many years, eventually down to the water table. In 1958, the town amended its ordinances to prohibit any excavation below the water table, and the owner claimed a constitutional taking. This Court rejected the claim because no evidence had been introduced concerning the value of the land subject to the regulation. The Court stated (369 U.S. at 594 (footnote omitted; emphasis added)):

> There is no set formula to determine where regulation ends and taking begins. *Although a comparison of values before and after is relevant* * * * it is by no means conclusive * * *. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.

Consistent with this Court's holding in *Goldblatt*, the court below remanded for the trial court to consider the market value of the land subject to Corps' regulation.

2. Petitioner also contends (Pet. 14-15) that the court of appeals erred in establishing "an analysis based exclusively on the relationship of the owner's basis or investment in the property and a comparison of its fair market value before and after the taking." This contention—which misstates the court of appeals' decision—has no merit. The court of appeals' analysis is not based *exclusively* on the value of the property as subject to the regulation; rather, the court held only that that value is one factor to be taken into consideration.

Petitioner then posits (Pet. 16-18) that the market value of the land cannot be considered, because that value is based on speculation that sometime in the future the Corps will issue a permit allowing the land to be used for mining. This argument misses the point. The court of appeals addressed the present value of the property in today's market—what a willing buyer would now pay to a willing seller, taking into account the present uncertainty as to how the property may be used in the future. This present market does not depend on future actions by the Corps. The focus is on the present value of the land and how it may affect an analysis of whether a taking has occurred. No estimation of the probability of future Corps action is necessary to determine that value.

Nor is petitioner correct in asserting that the court of appeals' approach "assures there can never be a regulatory taking" (Pet. 18). All the court said is that the present market value of the property is a pertinent factor in determining whether a taking has occurred. Plainly this does not amount to a holding that a regulatory taking may never occur.[10]

3. Petitioner's final contention (Pet. 18-21) is that it is due compensation for its entire 1,560-acre tract, even though the application to the Corps sought permission to mine only 98 acres. The court of appeals' opinion (Pet. App. 27-28) fully answers that contention. Even if it is assumed that any further

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[10] Petitioner does not challenge the alternative ground for the holding of the court of appeals: that errors in the trial court's factfinding procedures required reversal. Thus, no matter what the disposition of the questions raised in the petition, the case will have to be remanded to the trial court for further proceedings.

application for a mining permit would be denied by the Corps—an assumption which has not been established on the evidentiary record (see *id.* at 27)—there is no basis for requiring the United States to pay for the entire tract. It is conceded that in three years petitioner would mine only 98 acres. There is, accordingly, no basis upon which petitioner would presently be entitled to the windfall of compensation for land which it would not be able to mine for many years in the future.

Furthermore, as the court of appeals held (Pet. App. 28), it is sensible to use the 98 acres as a test case for determining whether the Corps' actions amount to a taking. If the refusal to permit limestone mining is held to be a taking, the Corps retains the authority to reach a different decision should petitioner request a permit to mine the remainder of the tract. If petitioner does make such an application for the remainder of its property, the Corps would be free to take into account any changed circumstances that may cause it to find that a mining permit would then be in the public interest. Unless and until all those eventualities come to pass, whatever claim petitioner asserts with respect to the remaining acreage is not ripe for adjudication. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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